Tentative Rulings for November 25, 2003
Departments 22, 70, 72, 73, 98B

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, Rule 321(c).)

03CECG03906 Kempff v. Stephenson (Dept. 98B)

01CECG01026 Hunter v. Hubbard (Dept. 73)

02CECG03271 Sanchez v. Caterpillar Inc (Dept. 22)

03CECG00781 Dr. Al Aguirre v. Gregory (Dept. 22)

(Tentative Rulings begin at next page)

Tentative Ruling

Re: **Ruhl v. Donan**
Superior Court Case No. 03CECG01897

Hearing Date: Nov. 25, 2003 **(Dept. 22)**

Motions: Defendants' (Theresa Berry, E.V. Warner, Inc., Valley Dental, Inc. and M&H Property Management, LLC) Demurrer to Original Complaint.

Tentative Ruling:

To SUSTAIN, in part, WITH LEAVE TO AMEND. (CCP 430.10.) Plaintiff shall have 10 calendar days' leave, from the clerk's service of the minute order, within which to file a First Amended Complaint. All new allegations therein shall be set forth in **boldface** type.

Explanation:

Both the first and second causes of action in the Complaint fail to allege facts sufficient to state claims against Defendants. The Demurrer is SUSTAINED on this ground, WITH LEAVE TO AMEND.

Defendants argue that the complaint is time-barred by the one-year statute of limitations of CCP 340.5. But it is not apparent on the face of the complaint that the plaintiff discovered or through reasonable diligence should have discovered the injury within one year. The Demurrer is OVERRULED on this ground. Plaintiffs have filed no Opposition.

Pursuant to CRC rule 391 (a) and CCP 1019.5 (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: **DSB** (Judge's initials) **on** **11-24-03** (Date).

Tentative Ruling

Re: **Bunker v. East Penn Manufacturing, Inc.**
Superior Court Case No. 03CECG01308

Hearing Date: November 25th, 2003 **(Dept. 22)**

Motion: Defendants Danny Drake and KMC Marketing's Motion for Mental/Physical Examination of Plaintiff Patricia Bunker

Tentative Ruling:

To deny the motion for mental/physical examination of plaintiff Patricia Bunker. (CCP § 2032(d).)

Explanation:

While the defendants are entitled to one physical examination of the plaintiff since this is a personal injury action (CCP § 2032(b)(2)), here defendants wish to conduct two mental and physical examinations of the plaintiff. Defendants also seek to take plaintiff's examinations more than 75 miles from her residence. Thus, defendants cannot compel plaintiff to attend the examinations simply by serving a demand for examination, but must obtain a court order demonstrating good cause for the examinations. (CCP § 2032(d).)

In the present case, defendants have failed to demonstrate any good cause for conducting more than one mental or physical examination, or for taking the examinations more than 75 miles from plaintiff's residence. (CCP § 2032(d).) Defense counsel claims that good cause exists for compelling the examinations because plaintiff has claimed brain damage and significant cognitive defects, as well as ongoing physical complaints. (Stoudt decl., ¶ 9.) Plaintiff admits that she will seek damages for mental and physical injuries associated with the accident. (Sample decl., ¶ 3.) Thus, plaintiff's mental condition is clearly at issue here. However, defendants wish to conduct two separate mental and physical examinations here, one with a neuropsychologist (Dr. Kramer) and one with a neurologist/psychiatrist (Dr. Strassberg). Yet defendants make no effort to explain why they need two neurological/psychological examinations rather than one. At most, defendants have shown good cause for one such examination.

In addition, defendants have not shown any good cause for conducting the examinations more than 75 miles from plaintiff's

residence. (CCP § 2032(d).) Defense counsel notes that plaintiff has been a family and marriage therapist and member of the psychology profession in Fresno for 20 years, and has undergone treatment from mental health care professionals in the Fresno area for 15 years. (Stoudt decl., ¶ 4.) Defense counsel then implies that because of plaintiff's profession, she would be unable to find any neutral mental health professionals in the Central Valley area to examine plaintiff. However, defense counsel has not alleged that she has made any attempt to locate a neutral examiner in the Fresno area, and that her efforts have been fruitless. Nor has counsel stated any facts showing that plaintiff is so well-known in Fresno that none of her colleagues could perform a neutral examination.

Certainly, the court cannot infer from the fact that plaintiff is an established member of the Fresno psychology profession that there is not a single mental health professional in the area who can conduct a neutral examination of her. Also, as plaintiff points out, defendants could have their examiners come to Fresno and conduct the examinations if defendants are so concerned about the neutrality of local health care professionals. Defense counsel apparently wishes the court to order plaintiff to travel 400 miles round trip for two days of examinations simply because of a vague concern about the possible lack of impartial examiners. However, such nebulous concerns do not constitute good cause for conducting an examination more than 75 miles from plaintiff's residence. Therefore, the court's tentative ruling is to deny the motion to compel the plaintiff to attend the examinations.

Pursuant to CRC 391(a) and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling DSB 11-24-03
Issued By: _____ on _____.
(Judge's Initials) (Date)

Tentative Ruling

Re: **Rosales v. Damlong**
Superior Court Case No. 03CECG03642

Hearing Date: November 25, 2003 **(Dept. 98B)**

Motion: Petition to compromise minor's claim

Tentative Ruling:

To grant. Order signed. Hearing off calendar.

Pursuant to California Rules of Court, rule 391, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A. M. Corona on November 20, 2003 .
(Judge's initials) (Date)

Tentative Ruling

Re: **Friedline v. Bio Clean Crises Scene Management, Inc.**
Superior Court Case No. 02CECG01777

Hearing Date: November 25, 2003 **(Dept. 98B)**

Motion: Petitions to compromise minor's claim

Tentative Ruling:

To grant. Orders approving compromise signed, orders to deposit funds into blocked account to be submitted for signature. Hearing off calendar.

Pursuant to California Rules of Court, rule 391, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Corona on November 20, 2003 .
(Judge's initials) (Date)

Tentative Ruling

Re: **Ardemagni v. Holt Lumber Inc.**
Superior Court Case No. 641917

Hearing Date: November 25, 2003 **(Dept. 22)**

Motion: By plaintiff to tax costs.

Tentative Ruling:

To deny.

Explanation:

If an item of cost is expressly allowed by statute and appears to be a proper charge, the verified memorandum of costs is prima facie evidence that the item is necessarily incurred, and the burden of proving otherwise is on the objecting party to show it is unnecessary or unreasonable. If, however, the item of cost does not on its face appear proper, the burden of showing that it is reasonable and necessary shifts to the party claiming the cost. (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 131.) "Once costs claimed in the memo are challenged via a motion to tax '[d]ocumentation must be submitted' to sustain the burden." (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1265, citation omitted.)

"CCP §998 seeks to penalize a litigant who, in refusing a reasonable settlement offer, causes the other party to suffer the expenses of expert witnesses "'reasonably necessary in either, or both, the preparation or trial of the case . . . .'" [Citation.] Since the statute does not specify precisely the services for which costs are recoverable, the determination of allowable costs is largely within the trial court's discretion. [Citation.]" (*Evers v. Cornelson* (1984) 163 Cal.App.3d 310, 317-318.)

Costs for models, blowups, and photocopies of exhibits are expressly allowed as costs if they were reasonably helpful to aid the trier of fact. (CCP §1033.5(a)(12).) The items of costs claimed in Item 11 appear facially proper. However, plaintiff has not met her burden of showing the claimed costs were unnecessary or unreasonable. Plaintiff asserts that defendant is attempting to charge an exorbitant rate for each blowup, but fails to present any evidentiary support for this assertion or her assertion that costs in this category should not exceed $25.

Defendants may recover expert witness fees pursuant to CCP §998. The items of cost claimed in Item 13 and listed in Worksheet 8b for such

fees appear facially proper, and thus plaintiff bears the burden of showing they were unnecessary or unreasonable. Plaintiff has not met this burden. Plaintiff has failed to provide evidentiary support for her assertions that the fees sought in connection with defense expert Andrew Levitt are unreasonable or that they should not exceed $500.

Plaintiff's suggestion that the fees are unreasonable because Levitt did not testify at trial is unavailing because expert witness fees are properly awarded for time spent by an expert witness in preparation for his or her trial testimony. (*Evers v. Cornelson*, *supra*, 163 Cal.App.3d at p. 317-318.) It appears the reason Levitt did not testify was because the parties entered a stipulation regarding liability on the first day of trial. There has been no showing by plaintiff that the time spent by Levitt in preparing for trial was unreasonable.

Pursuant to California Rules of Court, rule 391, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: **DSB** (Judge's initials) **on** **11-24-03** (Date).

Tentative Ruling

Re: **Dawson v. Dawson**,
Superior Court Case No. 03CECG02265

Hearing Date: November 25, 2003 **(Dept. 70)**

Motion: Motion for Award of Attorney's Fees

Tentative Ruling:

To grant the motion by Defendant Rosemary J. Dawson for an award of attorney's fees, as prevailing party, pursuant to the parties' agreement. (*CCP* 1021). The court finds, after apportioning the fees to those claims that come within the scope of the attorney's fees provision, that Defendant is entitled to recovery of attorney's fees in the amount of $2,902 (i.e., one-half of fees incurred).

Explanation:

Is the attorney's fees provision broad enough in scope to apply to this lawsuit, or to any of the causes of action asserted by Plaintiff? At least in part, Plaintiff's suit is based on the condition of the premises and improper "notice to quit" the tenancy, and Plaintiff's understanding of the lease/option, so it would seem that at least a portion of the Plaintiff's claims come within the scope of the fee provision which includes "any action…arising out of this agreement". (See, *Lerner v. Ward* (1993) 13 Cal.App.4th 155, 160 [similar provision found to encompass tort claims arising out of the agreement]). The court concludes that one-half of Plaintiff's claims are independent of the agreement (i.e., claims of premises liability/ elder abuse), and therefore not subject to the fee provision, but the other half of Plaintiff's claims arise out of the agreement and are subject to the attorney's fees clause, whether sounding in tort or contract. Thus, it is necessary to apportion the attorney's fees by one-half. (See, *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129).

The total attorney's fees incurred in defending this case is $5,804. (Declar. of Meine, par. 5, 11, 13). One-half of that sum is $2,902. Therefore, the court awards to Defendant, as prevailing party, the amount of $2,902 in attorney's fees, by virtue of the attorney's fees provision set forth in the lease/ option.

Pursuant to California Rules of Court, rule 391, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as

the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling hac 11/24/03
Issued By: _____ on _____.
(Judge's initials) (Date)

Tentative Ruling

Re: **Harlan v. The People of the State of California, et al.**
Superior Court Case No: 02CECG01290

Hearing date: November 25, 2003 **(Dept. 70)**

Motion: Defendant's motion for judgment notwithstanding the verdict; briefs regarding declaratory relief cause of action

Tentative Ruling:

To deny the motion for judgment notwithstanding the verdict. To deny plaintiffs' request to include in the judgment a declaration that defendant is obligated under the Possession and Use Agreement to construct an undercrossing.

Explanation:

Judgment notwithstanding the verdict:

The jury found that the Harlan's claim did not accrue before February 1, 2001. (Special Verdict – Breach of Contract, #4; Special Verdict – Breach of Covenant, #2.) A finding that the cause of action did not accrue before February 1, 2001, is not the same as a finding that plaintiffs did not sustain damages prior to that date. A cause of action accrues when, under the substantive law, the wrongful act is done or the wrongful result occurs, and the consequent liability arises; it accrues when the cause of action is complete in all its elements. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397.) An exception to the general rule is the discovery rule, which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. (*Id.*) The date of accrual of a claim against the state for which a government tort claim must be filed is the same. (Gov. Code § 901.)

Plaintiffs' causes of action for breach of the covenant of good faith and fair dealing did not accrue until defendant had breached the contract and the covenant, that breach had damaged plaintiffs, and plaintiffs had become aware of the breach and their injury. Consequently, the jury's verdict does not preclude an award for damage that was incurred prior to February 1, 2001.

Declaratory relief

The jury found "that the State's conduct excused, waived or estops the State from claiming any obligation to construct an undercrossing was subject to their (sic) first being a final settlement." (Special Verdict – Breach of Contract, #2.) The court, however, construed the contract as an agreement to negotiate toward a final settlement, not an agreement to build an undercrossing subject to a precondition of a final settlement. The interpretation of a written instrument, even though it involves what might properly be called questions of fact, is essentially a judicial function. (*DeGuere v. Universal City Studios, Inc.* (1997) 56 Cal.App.4th 482, 501.) Plaintiffs are not entitled to a judicial declaration that defendant is obligated to construct an undercrossing or to specific performance of such an obligation. (See also, *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 905 (a party may not obtain both specific performance and damages for the same breach of contract).)

Pursuant to California Rules of Court, rule 391(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: **hac** (Judge's initials) **on** **11/24/03** (Date).

Tentative Ruling

Re: **Sage v. Ypma et al.**
Superior Court Case No. 03CECG00635

Hearing Date: November 25, 2003 **(Dept. 70)**

Motion: Demurrer to the Third Amended Complaint

Tentative Ruling:

To overrule the general and special demurrers to all causes of action. An Answer is to be filed within ten days of notice of the ruling. The time in which the complaint can be answered will run from service by the clerk of the minute order.

Explanation:

First Cause of Action

The Plaintiff is correct in his contention that he does allege at ¶ 18 at page 7 that Ypma and Markle promised the Plaintiff that he would receive 3% commission for all product shipped from the Sanger plant plus 1% for travel and promotion. He also alleges that the contract was oral. See ¶ 19. On the other hand, the Defendants are correct in their assertion that the first cause of action does incorporate by reference the initial sixteen paragraphs consisting of six pages labeled "Allegations common to all causes of action". Yet, the practice of incorporation by reference is permissible. See *Cal-West Nat'l Bank v. Sup. Ct. (Phillips) (1986) 185 Cal.App.3d 96, 100-101 and Kajima Eng. & Const. Inc. v. City of Los Angeles (2002) 95 Cal.App.4th 921, 931-932.* Ultimately, the first cause of action is adequately pleaded and the general and special demurrers will be overruled.

Second Cause of Action

The Plaintiff alleges breach of contract against Defendant Initiative Foods, Inc. via ratification. See ¶¶ 24-28. The Plaintiff was instructed in the previous ruling that because Initiative Foods, Inc. was not formed until August 16, 2002, the Plaintiff should allege ratification in order to hold the corporation liable for breach of the oral contract based upon the representations of Defendants Ypma, Mulvaney, and Markle. See *Smith v. Glo-Fire Co. (1949) 94 Cal.App.2d, 154.* The allegations appear sufficient. The Plaintiff has alleged that the individual Defendants who promised him his commission are the same Defendants who formed Initiative Foods. See ¶¶ 3-6. He further alleges at ¶ 24 that Initiative

ratified the promises of these individuals by communications regarding customer orders for 2003—the date after the corporation was formed. Ratification may be established by implication. Id. at 160. As for the argument that it cannot be ascertained whether the contract is oral or written, the Plaintiff incorporated by reference ¶ 19 in which he alleges that the contract was oral. Again, this practice is permitted. See *Cal-West National Bank, supra.* Thus, the general and special demurrers will be overruled.

Third Cause of Action--Fraud via False Promise

The essential elements of a claim of fraud by a false promise are set forth in BAJI 12.40. According to *4 Witkin California Procedure (4th Ed 1997) § 677*: "A false promise is actionable on the theory that a promise implies intention to perform, that *intention to perform or not to perform* is a state of mind, and that misrepresentation of a state of mind is a misrepresentation of *fact.* The allegation of a *promise* (which implies a representation of intention to perform) is the equivalent of the ordinary allegation of a representation of fact.

In the instant case, the Defendants again cite inter alia to *Tenzer v. Superscope (1985) 39 C.3d 18, 29, 30, 31* in support of their demurrer. To reiterate, in that case, the plaintiff was a corporate director who had sued the corporation for breach of oral contract, unjust enrichment and fraud. Plaintiff alleged that an oral contract to pay a finder's fee in a real estate transaction was enforceable, that defendant was estopped to assert the statute of frauds as a defense, and that plaintiff may maintain an action for fraud even if the underlying oral agreement was unenforceable. Summary judgment was granted in favor of the corporation on the grounds that an action for fraud cannot be maintained where the allegedly fraudulent promise is unenforceable as a contract due to the statute of frauds. This was the rule as stated in *Kroger v. Baur (1941) 46 Cal.App.2d 801*.

The Supreme Court reversed and disapproved *Kroger* and those cases in accord. It determined that the doctrine of estoppel to plead the statute of frauds may be applied where necessary to prevent either unconscionable injury or unjust enrichment. Accordingly, summary judgment was improperly granted and triable issues of material fact existed on the fraud claims. While the High Court did opine that something more than nonperformance is required to **prove** the defendant's intent not to perform his promise, it also held that fraudulent intent may be established by **circumstantial evidence.**

In the instant case, the Plaintiff correctly argues that this case is still at the pleading stage and the holding of *Tenzer, supra* does not apply at this time. The Plaintiff has alleged all of the elements of a false promise. As for the required specificity of pleading, it appears that he has alleged all facts within his knowledge (and verified the complaint). It has been held that it is improper and insufficient for a plaintiff to simply plead the evidence by which he hopes to prove the ultimate facts necessary to state a cause of action. See *Careau & Co. v. Security Pacific Business Credit, Inc. (1990) 222 Cal.App.3d 1371, 1390*. But, if sufficient facts are stated, any evidentiary facts can be disregarded as **surplusage**. See *Anglo Amer. Land Co. v. Sundberg* (1924) 66 C.A. 331, 333. Further, a complaint is to be construed liberally with a view to substantial justice between the parties. See CCP § 452 and *Terry Trading Corp. v. Barsky (1930) 210 Cal. 428 at 438.* Accordingly, the general demurrer will be overruled.

Pursuant to California Rules of Court, rule 391, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling hac 11/24/03
Issued By: _____ on _____.
(Judge's initials) (Date)

Tentative Ruling

Re:	**Meza et al. v. Maestro et al.** Superior Court Case No. 02CECG02017
Hearing Date:	November 25, 2003 **(Dept. 22)**
Motion:	By Defendants Drinnon and The Living Room seeking the imposition of terminating sanctions against Plaintiff Swanson

Tentative Ruling:

To grant the motion pursuant to CCP § 2023(b)(4)(C). The action filed by Plaintiff Swanson will be dismissed. The prevailing Defendants are directed to submit to this court, within 7 days of service of the minute order, a proposed judgment dismissing the action as to Defendants Drinnon and the Living Room.

Explanation:

On April 1, 2003 the moving Defendants served notice of the taking of the depositions of all Plaintiffs upon their attorney of record. The Plaintiffs did not appear for their depositions and Defendants Drinnon and The Living Room filed a motion to compel on May 5, 2003. The motion to compel the depositions of the Plaintiffs was granted on June 19, 2003. An order was signed, served and filed on June 23, 2003. See Exhibit A attached to the request for judicial notice.

On August 28, 2003 Defendants re-served the deposition notices upon the Plaintiffs upon their attorney of record. The depositions of all Plaintiffs were set for October 7, 2003. After Plaintiff's attorney withdrew on September 15th, Defendants' attorney wrote to Swanson reminding her of the deposition date, time, etc. See Declaration of Cooper at ¶¶ 2-3 and Exhibit B attached thereto. Although the other Plaintiffs attended their depositions, Plaintiff Swanson failed to show. See Exhibit C. On October 24, 2003 Defendants filed and served a motion seeking the imposition of terminating sanctions or in the alternative, monetary sanctions. No opposition has been filed. The motion will be granted for failure to obey an order to provide discovery. See *Lang v. Hochman (2000) 77 Cal.App.4th 1225, 1244.*

Pursuant to California Rules of Court, rule 391, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as

the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling DSB 11-24-03
Issued By: _____ on _____.
(Judge's initials) (Date)

Tentative Ruling

Re: **Gateway Academy v. Fresno Unified School District, et al.**
Superior Court Case No: 03CECG00574

Hearing date: November 25, 2003 **(Dept. 73)**

Motion: Defendants' demurrer to third amended complaint

Tentative Ruling:

To overrule the demurrer of FUSD and Shepherd. To sustain the demurrer of Marmolejo with 10 days leave, running from service of the minute order by the clerk, to file a fourth amended complaint. All new allegations in the fourth amended complaint are to be set in **boldface** type.

Explanation:

A general demurrer based on the statute of limitations is only permissible where the dates alleged in the complaint show that the action is barred by the statute of limitations. (*Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 324.) If those dates are missing, there is no ground for a general demurrer. (*United Western Medical Centers v. Superior Court* (1996) 42 Cal.App.4th 500, 505.) The running of the statute must appear clearly and affirmatively from the dates alleged; it is not sufficient that the complaint might be barred. (*Roman*, at 324.) The second cause of action does not state when the events alleged therein occurred. The face of the second cause of action does not show that it is necessarily barred by the statute of limitations.

Before an action against a public entity or its employee can be brought for personal injury or personal property damage a claim must be filed with the public entity. (Gov. Code §§ 905, 950.2; *Massa v. Southern Cal. Rapid Transit Dist.* (1996) 43 Cal.App.4th 1217, 1222.) The claim must be filed within six months after accrual of the cause of action. (Gov. Code §§ 911.2.) The public entity must act on the claim within 45 days after it is presented, or it is deemed rejected. (Gov. Code § 912.4.) Generally, an action against a public entity on a cause of action for which a claim must be presented must be commenced within six months after notice of rejection has been served, or within two years after accrual of the cause of action if no such notice is given. (Gov. Code § 945.6, subd. (a).) The third amended complaint alleges FUSD is a political

subdivision of the City of Fresno and Shepard and Marmolejo are its employees. FUSD is therefore a public entity. (Gov. Code § 900.4.) The time limitations found in the Government Tort Claims Act, rather than in Code of Civil Procedure section 340, apply. (*Massa*, at 1220-1221.)

The first cause of action does not allege when the claim was made, when it was rejected, or whether notice of rejection was given. It alleges that the slanderous statements were made between November 10, 2001 and January 20, 2002. Thus, from the face of the complaint, a complaint filed as late as January 20, 2004, might be timely (two years after accrual).

Plaintiff, however, concedes in its opposition that a government tort claim was presented and was rejected on August 22, 2002. This constitutes a judicial admission. (*Smith v. Walter E. Heller & Co.* (1978) 82 Cal.App.3d 259, 269.) Consequently, the last date for filing a complaint was February 24, 2003. The original complaint was timely filed against FUSD and Shepherd. Defendants have cited no authority for the proposition that the striking of the original complaint prevents the third amended complaint from relating back to the date of filing of the original complaint for statute of limitations purposes.

The relation back doctrine requires that the amended complaint must (1) rest on the same general set of facts, (2) involve the same injury, and (3) refer to the same instrumentality as the original one. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 408-409.) Both the original and the third amended complaint appear to be based on the same general set of facts: the loss of plaintiff's charter and the closure of its schools allegedly as a result of the conduct of Shepard and FUSD, which included misstatements or statements that omitted crucial information. They involve the same injury (the loss of the school charter, the closure of plaintiff's schools and the resultant financial loss), although the third amended complaint adds allegations of damage to plaintiff's reputation. Both complaints refer to the same instrumentality.

The general rule is that an amended complaint that adds a new defendant does not relate back to the date of filing the original complaint and the statute of limitations is applied as of the date the amended complaint is filed, not the date the original complaint is filed. (*Woo v. Superior Court* (1999) 75 Cal.App.4th 169, 176.) Marmolejo was added as a defendant for the first time in the third amended complaint. As to her, commencement of the action was untimely.

Consequently, whether or not the third amended complaint relates back to the filing date of the original complaint, it does not show on its

face that the first cause of action is necessarily barred by the statute of limitations.

Pursuant to California Rules of Court, rule 391(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: **MWS** (Judge's initials) **on** **11/24/03** (Date).

Tentative Ruling

Re: **Thao v. Amtrak**
Superior Court Case No. 01CECG00230

Hearing Date: November 25, 2003 **(Dept. 73)**

Motion: Petitions to compromise minor's claim

Tentative Ruling:

To grant. Orders signed. Hearing off calendar.

Pursuant to California Rules of Court, rule 391, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: **MWS** (Judge's initials) **on** **11/24/03** (Date).